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IN THE SUPREME COURT OF THE STATE OF IDAHO

TELFORD LANDS LLC, an Idaho Limited Liability Company, MITCHELL D. SORENSEN, an individual, and PU RANCH, a general partnership, Plaintiffs-Respondents, vs. DONALD WILLIAM CAIN and CAROLYN RUTH CAIN, husband and wife, and JOHN DOES 1-20, individuals, and JANE DOES 1-20, individuals Defendants-Appellants	Supreme Court Docket No. 39466-2011 Butte County Case No. CV-10-64 **RESPONDENTS' BRIEF**

RESPONDENTS' BRIEF

Appeal from the District Court
of the Fifth Judicial District of the State of Idaho, in and for Butte County
Honorable Joel E. Tingey, Presiding

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I. STATEMENT OF THE CASE.

A. NATURE OF THE CASE.

This case is an easement dispute concerning a buried irrigation pipeline which has caused an actual impact to the Appellants' property of an appraised value of twenty-seven dollars and fifty- five cents ($27.55). The pipeline belongs to the Respondents Telford Lands LLC, Mitchell D. Sorensen, and PU Ranch (collectively, "Respondents").[1] Respondents are farmers who—like most farmers in Idaho—rely upon the diversion of water for the irrigation of their farmland located in Butte County, Idaho.

The pipeline originates on land owned by PU Ranch, which has ground water wells owned and operated by Sorensen and PU Ranch, and from which Telford receives water pursuant to an authorized water supply bank lease approved by the Idaho Department of Water Resources ("IDWR"). The pipeline then traverses a 100-foot wide strip of property next to Highway 93 (the old railroad) which is owned by Donald and Carolyn Cain (collectively, "Cains" or "Appellants"). The irrigation pipeline is located just north of the Moore Canal, a facility owned and operated by the Big Lost River Irrigation District (hereinafter, "BLRID"). The irrigation pipeline and the Moore Canal are located approximately a half mile north of the home and business of the Appellants, who are both realtors/residential appraisers. There is a dispute over whether Appellants authorized the installation of the pipeline next to the Moore Canal. Eventually,

[1] In *Appellant's Brief*, the Defendants/Appellants refer to the Respondents collectively as the "Ranchers." The pipeline at issue in this matter is for the Appellants' farming operations, not for ranching. It would be accurate to refer to the Appellants as "farmers," but for purposes of this brief, they will be referred to as "Respondents."

litigation ensued after attempts to purchase the easement were unsuccessful due to the six figure dollar demands of the Appellants for the easement.

The district court granted summary judgment in favor of Respondents permitting them to continue to have their pipeline go through the 100-foot railroad property pursuant to eminent domain. Appellants eventually stipulated that the actual value of the easement in dispute in this matter is twenty-seven dollars and fifty-five cents ($27.55), with a token value of five hundred dollars ($500.00). See R. Vol. 4, p. 759. After a decision on a motion for reconsideration, further proceedings were scheduled on the issue of whether the legal description provided by Respondents in a proposed order was appropriate, but Appellants did not challenge the surveyed legal description provided by Respondents when the district court provided the opportunity to do so.

Appellants have now appealed the district court's summary judgment decision regarding whether Respondents can exercise eminent domain, which is the major issue on this appeal. Appellants have now also raised a constitutional due process issue for the first time, and alleged that the district court abused its discretion by not awarding Appellants their attorney fees.

B. COMBINED STATEMENT OF FACTS AND COURSE OF PROCEEDINGS BEFORE THE DISTRICT COURT.

1. Respondents are water users entitled to divert ground water for irrigation purposes on their respective farms, which are generally located south and west of Arco, Idaho, in an area commonly referred to as the "Era Flat." See R. Vol. 8, p. 1276. Until 2009, Respondents pumped their ground water into a canal owned and operated by BLRID known as the Moore Canal, and the ground water was delivered to their authorized places of use for agricultural

purposes. Respondents Telford and PU Ranch entered into transport agreements with BLRID for use of the Moore Canal. *Id.*

2. BLRID has historically refused to enter into a transport agreement with Plaintiff Sorensen, on grounds that Sorensen's well was abandoned, despite having received a decree from the Snake River Basin Adjudication Court for the water right associated with Sorensen's well. R. Vol. 1, p. 111-12 (Letter from BLRID to IDWR: "Using this well requires a transport agreement with BLRID which was not granted last year and will not be granted this year. The well was abandon and re-drilled in [a] different location."); See also R. Vol. 1, p. 117 (Portions of Mitchell Sorensen Deposition, p. 46, L. 5 through p. 48, L.19).

3. Respondents also determined that commingling of water in the Moore Canal often resulted in Respondents being charged significant, highly variable, and unexplainable conveyance losses on their ground water by BLRID. Respondents determined that a cooperative project would benefit all three parties, and make the project economically feasible for all parties to operate their own conveyance system. R. Vol. 8, p. 1276. The participation of all three Respondents was absolutely necessary because of the need for the combined water amounts. Respondents could then control their water supplies in the pipeline until it discharged into the portion of a seldom used canal known as the "UC Canal." Eventually, water in the UC Canal makes its way to the "Timberdome Canal," which is actually an abandoned portion of the lower UC Canal, before it arrives on Respondents' farmland. R. Vol. 1, p. 121-206.

4. Prior to commencement of the project, Respondents determined which lands the pipeline would cross, and obtained easements from those landowners. R. Vol. 2, p. 317-18

(Deposition of Michael Telford at p. 9, L. 16 through p. 11, L. 23 summarizing efforts to obtain other easements from other landowners). As part of that process, prior to installation of the pipeline, Respondents' agent Boyd Burnett contacted Mr. Cain to inform him of Respondents' intentions to place the pipeline on Appellants' property, and to visit with him concerning the project. Mr. Cain consented to the work moving forward and it was Mr. Burnett's understanding that if an easement document was necessary in the future, Appellants would provide the same. R. Vol. 1, p. 173 (Boyd Burnett Deposition at p. 22, L. 13 through p. 24, L.9); Preliminary Injunction Exhibit F (Affidavit of Boyd Burnett).

5. In order to construct the pipeline, Respondents first determined that they would need to cross underneath Highway 93, and located what appeared to be an abandoned 48" culvert located next to the Moore Canal crossing through which Respondents could place the pipeline. The culvert was entirely filled with mud and debris, which Respondents cleaned out, and the pipeline was then installed. R. Vol. 8, p. 1277; Preliminary Injunction Exhibits B and C. Respondents cleaned out the culvert only after receiving a permit from the Idaho Transportation Department to use the culvert. R. Vol. 2, p. 324 (Deposition of Michael Telford at p. 34, LL. 2-20 (describing permit from ITD). Upon discovering the pipeline in the culvert, BLRID objected to Respondents' use of the culvert, and asserted ownership over the culvert. BLRID ultimately unilaterally removed the pipeline, and thereafter, Respondents filed suit against BLRID, wherein Respondents alleged that the culvert was abandoned and available for Respondents' use. R. Vol. 8, p. 1277, 1291-92.

6. Respondents and BLRID eventually resolved their dispute by entering into a settlement agreement set forth at Exhibit B to the *Complaint* (R. Vol. 8, p. 1290-1308), which required Respondents to cease use of the culvert, and instead required Respondents to bore underneath Highway 93 at a separate location in order for the pipeline to cross Highway 93. The settlement agreement provided that Respondents would no longer use the Moore Canal to convey their diverted ground water, and specifically allowed the existing transport agreements of PU Ranch and Telford to sunset relative to their wells at the project site. *Id.* Sorensen did not have an existing transport agreement. R. Vol. 8, p. 1277. Therefore, Respondents, at significant expense, contracted with construction companies to bore underneath the Highway just north of the culvert and to relocate the pipeline to align with the bore hole location, all at additional expense. R. Vol. 8, p. 1277.

7. Given the proximity of the pipeline construction to Appellants' home, the significant construction activities supervised by Terrell Kidd (Preliminary Injunction Binder Exhibit E (*Affidavit of Terrell Kidd*)), the work performed by Thomas Darland on Appellants' property which Mr. Cain requested when Darland was at the project site (Preliminary Injunction Binder Exhibit G (*Affidavit of Thomas Darland*)), it appears that Appellants were aware of the construction activities relating to the pipeline installation. At the time of construction, Appellants voiced no objection to the project to the construction workers or Respondents. The pipeline was operational for the 2009 irrigation season.

8. In late August or early September of 2009, the Respondents learned that Appellants objected to the pipeline. Mr. Telford visited with Mr. Cain to discuss those concerns and to see if a

solution could be worked out. Mr. Cain was receiving pressure from his neighbors who were opposed to the project, and did not know what to do. R. Vol. 2, p. 317-19 (Deposition of Michael Telford at p.8, L. 8 through p. 17, L. 22).

9. Three months after the pipeline was installed and operational, in mid-September 2009, Appellants, through counsel, objected in writing to the pipeline and demanded payment for an easement for the pipeline in the amount of $150,000.00. In response to the $150,000.00 offer, Respondents attempted to negotiate in good faith, but could not reach an agreement to purchase the easement. Respondents believed Appellants' final offer for the easement of $105,000.00 was in substantial excess of the fair market value of the easement, particularly because the entire one-acre parcel under which the pipeline runs was purchased by Appellants in 1996 for $1,500.00. R. Vol. 1, p. 235-44, 181-98 (negotiation letters); R. Vol. 1, p. 227 (purchase price information).

10. On February 23, 2010, Appellants, now unrepresented by counsel, filed a small claims action against the Respondents (Small Claims Case No. CV-2010-20 in and for Butte County) for $5,000.00 for the eventual costs of removing the pipeline. After the small claims action was filed, Mr. Telford again went to Mr. Cain to attempt to work out a solution. R. Vol. 2, p. 319-20 (Deposition of Michael Telford at p. 17, L. 23 through p. 20, L. 20).

11. However, prior to the small claims action being heard, in late April of 2010, Mr. Cain damaged the pipeline by breaking a hole in the pipeline, and then sent letters to Appellants informing them of his self-help actions. R. Vol. 8, p. 1322 (photograph of the destroyed pipeline). The destruction of the pipeline occurred as Respondents had begun to plant crops

for the 2010 irrigation season. Respondents were in need of irrigation water for these crops, particularly because on April 14, 2010, the Governor of the State of Idaho declared a drought emergency for Butte County due to low snowpack. R. Vol. 8, p. 1314-16 (*Order Declaring Drought Emergency*).

12. Respondents determined that it would be in their best interests to seek a TRO or preliminary injunction in order to fix the pipeline. However, prior to filing the injunction action, counsel for Respondents once again contacted Mr. Cain and offered $5,000.00 for an easement for the pipeline, which Mr. Cain refused. R. Vol. 1, p. 25. After hearing oral argument on the matter, the district court entered a preliminary injunction on May 20, 2010 in favor of Respondents. R. Vol. 1, p. 31-34.

13. After entry of the preliminary injunction, Respondents and Cain (now represented by counsel) continued to negotiate in good faith for the purchase of an easement. No agreement was reached. R. Vol. 1, p. 200-05 (additional negotiation correspondence). After these attempts to negotiate for the purchase of the easement failed, Respondents proceeded with the action to acquire the necessary easement through eminent domain.

14. On September 14, 2010, Respondents filed a motion for partial summary judgment on the count of eminent domain. R. Vol. 1, p. 63. The district court granted Respondents' motion for summary judgment in a *Memorandum Decision and Order* dated October 20, 2010. R. Vol. 4, p. 674. At the time of the summary judgment decision, an evidentiary hearing was set for November 4, 2010 on the issue of payment of just compensation. Appellants filed a motion for reconsideration on October 29, 2010, and sought additional discovery before the

filing of the memorandum in support of the motion. R. Vol. 4, p. 738. As a result, the evidentiary hearing on the remaining just compensation issue was vacated. On December 6, 2010, the case was, for a time, administratively assigned to Judge Dane H. Watkins, Jr. R. Vol. 4, p. 746.

15. After additional depositions of Scott Slocum of PU Ranch and Jim Rindfleisch, Appellants filed a memorandum in support of his motion for reconsideration. R. Vol. 4, p. 747. In this memorandum, Appellants stipulated to the determination of just compensation for the easement submitted by Respondents in the amount of $500.00 ($27.55 actual damages) based upon their appraiser's report. R. Vol. 4, p. 759. At the motion for reconsideration hearing, Respondents informed the court that they intended to have a survey performed of the easement at issue in the event the court upheld its prior decision on summary judgment. Tr. *Motion for Reconsideration*, p. 21, LL. 6-19. The court entered its memorandum decision and order denying the motion for reconsideration on May 26, 2011. R. Vol. 9, p. 1524.[2] Respondents conducted a survey thereafter, and finalized the survey legal description in late June of 2011.

16. In July of 2011, Respondents submitted a proposed order and judgment. By letter, Appellants objected to the proposed judgment and order because the proposed order contained the surveyed legal description. Appellants later formally objected to the

[2] The decision was inadvertently excluded in the record, and is the subject of a stipulation to augment the record. This decision should have automatically been included under I.A.R. 28 (b)(1)(H). Citations to this decision in this brief will begin at Vol. 9, p. 1524 (the first page) through 1535 (the last page).

inclusion of the surveyed legal description in the final judgment and order. R. Vol. 6, p. 1022, 1072.

17. On August 23, 2011, the court granted Appellants' objection and ordered the parties to submit evidence or argument within fourteen (14) days as to the proper legal description to be included in the final judgment and order. The court also allowed the parties to schedule a hearing on the matter, which the Respondents did. R. Vol. 6, p. 1075.

18. Respondents timely submitted evidence and argument. Appellants did not. On September 29, 2011, the district court entered its order on the legal description issue, and signed the proposed judgment and order with the surveyed legal description. *Id.* Respondents thereafter withdrew their *Motion to Amend Complaint Pursuant to I.R.C.P. 15(a)*, which they previously filed out of an abundance of caution. Both parties then requested attorney fees, and both requests were denied. R. Vol. 7, p. 1251. This appeal followed.

II. ADDITIONAL ISSUES PRESENTED ON APPEAL PURSUANT TO I.A.R. 35.

Appellants have asserted the issues on appeal outlined in page 11 of *Appellants' Brief.* In light of the arguments made by Appellants, Respondents assert the following additional issues on appeal pursuant to I.A.R. 35:

1. Whether Appellants, in this appeal, can discuss and argue from portions of the Rindfleisch and Harris Affidavits, which portions were struck by the district court and where no argument has been made to overturn the district court in that regard on appeal.
2. Whether Appellants can argue that Appellants' due process rights were violated when that issue was never raised before the district court.

3. Whether Appellants can assert on appeal that Respondents' *Complaint* was deficient when Appellants were given an opportunity by the district court to challenge Respondents' proposed legal description and chose not to challenge the description.

4. Whether Respondents should be awarded costs and attorney fees on appeal pursuant to Idaho Code § 12-121 and I.A.R. 40 and I.A.R. 41.

III. ARGUMENT[3]

A. Standard of Review.

The Appellants have primarily appealed the district court's decision to grant Respondents' *Motion for Partial Summary Judgment* relative to the eminent domain claim, as well as the district court's denial of Appellants' *Motion for Summary Judgment* on their counterclaim for trespass. The standard of review before this Court is well established:

> When reviewing a grant of summary judgment, this Court applies the same standard of review used by the district court in ruling on the motion. A grant of summary judgment is warranted where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The moving party bears the burden of proving the absence of an issue as to any material fact. The facts must be liberally construed in favor of the non-moving party.

Security Financial Fund, LLC v. Thomason, 282 P.3d 604, 607 (2012) (internal citations omitted). In addition:

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[3] While the first eleven pages of *Appellants' Brief* are double spaced in compliance with I.A.R. 36(c), the entire thirty-five page argument section of the brief has a line spacing of one and a half, which does not comport with I.A.R. 36(c). Further, the bottom margin is one inch, not one and half inches as required under I.A.R. 36(c). There are no procedures to object to these violations, but is appears this was done to permit additional room for argument in *Appellants' Brief*. We note the objection here, and presume the Court will address it as it deems appropriate, if at all.

> When an action will be tried before a court without a jury, the court may, in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed evidentiary facts. Drawing probable inferences under such circumstances is permissible because the court, as the trier of fact, would be responsible for resolving conflicting inferences at trial. However, if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented, then summary judgment is improper. Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party.

Losee v. Idaho Company, 148 Idaho 219, 222, 220 P.3d 575, 578 (2009) (internal citations omitted).

B. Appellants, in this appeal, should not be permitted to substantively discuss and argue from portions of the Harris and Rindfleisch Affidavits because these portions were stricken by the district court on Appellants' and Respondents' motions respectively.

Before proceeding to the heart of the appeal, there is a preliminary matter that must first be addressed. Throughout these proceedings, Appellants have argued that Respondents, in a premeditated fashion, intentionally allowed the 2009 ground water transport agreements to sunset in order to create their own necessity in a future eminent domain proceeding with the Appellants, even though Appellants had not yet objected to the pipeline. See, e.g., *Appellants' Brief* at 44 (". . . [Respondents] manufactured their own alleged necessity . . .") In an effort to provide some context to the agreement and demonstrate that this was not the case, counsel for Respondents attempted to introduce his own hand written notes from the settlement meeting with BLRID.

After objection by Appellants, (Tr. *Motion for Summary Judgment*, p. 105, LL. 12-25), the court concluded in its *Memorandum Decision and Order* to exclude the handwritten notes because

counsel would be testifying as a witness. R. Vol. 4, p. 677. The court's rationale was correct, and certainly with the benefit of hindsight, the attempt to introduce the notes was unwise.

In addition, Respondents moved to strike paragraph 4 and the final sentence of paragraph 6 of the *Affidavit of Jim Rindfleisch*, the BLRID manager, regarding his interpretation of a letter sent prior to his employment with BLRID, and his claim that the Respondents insisted on terminating the ground water transport agreements. The motion to strike was granted. After a deposition was taken of Mr. Rindfleisch, which was then relied upon in a motion for reconsideration on the motion to strike, the district court denied the motion for reconsideration and the evidence remained excluded. R. Vol. 9, p. 1526-27; See also R. Vol. 4, p. 677 (Judge Tingey decision granting motion to strike). Nevertheless, even with the district court's decisions on these matters, on appeal, Appellants have taken the liberty to argue freely from the substantive items that were stricken. See, e.g., *Appellants' Brief* at 7, 19, 26, 43 (discussing handwritten notes and claims that agreements were terminated at Respondents' request); *Id.* at 19 (discussing Rindfleisch testimony).

These arguments should be disallowed. On appeal, Appellants have not challenged the district court's decision to strike the notes and portions of Mr. Rindfleisch's affidavit. While Respondents' counsel would be happy to likewise freely discuss what his own handwritten notes mean, obviously this presents a difficulty the Appellants and the district court recognized. Including the stricken affidavits in the record on appeal in order to provide procedural background or to challenge the district court's decision to strike them would be appropriate, but it goes without saying that a stricken portion of the record cannot be substantively argued on appeal. See I.A.R.

28(c) (Parties are permitted to include in the record on appeal "affidavits considered by the court . . ."). Because their exclusion has not been challenged on appeal, it is inappropriate for Appellants to use portions of these stricken affidavits to substantively support their position.

C. The issue of whether the Appellants' due process rights were violated was not specifically plead in Appellants' counterclaim, there was no adverse ruling by the district court on this issue because it was not specifically raised before the district court, and it was not raised orally or in briefing on a motion for reconsideration. Therefore, because it has been raised for the first time on appeal, it should not be considered.

The first issue on appeal asserted by Appellants is whether they were denied due process of law. *Appellants' Brief* at 11. The issue of constitutional due process was not addressed in any of the proceedings before the district court, and should not now be considered on appeal. Appellants claim constitutional issues were "discussed in the original summary judgment arguments and briefings before Judge Tingey in this case, as well as in the reconsideration motion heard by Judge Watkins." *Appellants' Brief* at 13. However, there is no citation to where the constitutional matters were discussed (either orally or in writing), and Respondents have not located any.

This Court has held that "[t]o properly raise an issue on appeal there must either be an adverse ruling by the court below or the issue must have been raised in the court below, an issue cannot be raised for the first time on appeal." *McPheters v. Maile*, 138 Idaho 391, 397, 64 P.3d 317, 323 (2003); see also *Barmore v. Perrone*, 145 Idaho 340, 343, 79 P.2d 303, 306 (2008). As to such issues, including constitutional due process issues, "[i]t is well established that in order for an issue to be raised on appeal, the record must reveal an adverse ruling which forms the basis for

an assignment of error." *Krempasky v. Nez Perce County Planning and Zoning*, 150 Idaho 231, 236, 245 P.3d 983, 988 (2010).

In *Kolar v. Cassia County*, 142 Idaho 346, 127 P.3d 962 (2005), the appellant asserted error made by the district court on the issue of whether due process rights had been violated. *Id.* at 354, 127 P.3d at 970. The district court never ruled on the claim, and therefore, "the question becomes whether the issue was properly raised. This, in turn, depends upon what the meaning of the word 'raised' is." *Id.*

In *Kolar*, the relevant considerations were that the due process claim was raised orally by counsel at the summary judgment hearing (but no briefing was provided), and it was argued and briefed on a motion for reconsideration, even though the district court did not ultimately issue a decision on the matter. *Id.* The appellant argued his due process rights had been violated and this issue was properly raised before the district court. *Id.* The Court nevertheless determined the due process issue had been raised below and could be addressed on appeal.

In the case now before this Court, the due process issue was not contained in Appellants' *Answer and Counterclaim*, nor did the district court make a ruling on the due process issue in any of its decisions. It was not raised in any of the briefing on the motions for summary judgment, nor on the motion for reconsideration. Finally, a review of the transcript of the hearing on the motion for reconsideration reveals that the matters challenged by the Appellants before the district court were based squarely on the necessity requirement: "Mr. Harris and I are in basic accord that the issue of necessity is the true issue before this Court today." Tr. *Motion for Reconsideration* at p.9,

LL. 9-11; See also *id.* p. 20, L. 23 through p. 21, L. 3. Therefore, the due process issue was not raised orally by the Appellants in the district court proceedings.

Under the principles of the *Kolar* case, the due process issue in the matter now before this Court was not raised before the district court, has not been properly preserved on appeal, and therefore, the issue has been waived and should not be addressed on appeal. See *Krempasky*, 150 Idaho at 236, 245 P.3d at 988, and *Idaho Power Co. v. Idaho Dep't of Water Res.*, 151 Idaho 266, 279, 255 P.3d 1152, 1166 (2011) ("Because Idaho Power's argument . . . was not raised before the district court, it will not be addressed on appeal.").

D. The district court properly recognized this is an easement case, not a water rights case, and whether or not a water right was developed with a described delivery system is not relevant to whether Respondents can exercise eminent domain.

Appellants devote most of their brief to discussion of water rights documents, and have made the same arguments they made previously to the district court that various water rights documents require delivery of Respondents' ground water through the Moore Canal. See, e.g., R. Vol. 4, p. 751-55 (*Memorandum in Support of Motion for Reconsideration*). The argument is that this defeats a finding of reasonable necessity, which would prohibit the exercise of eminent domain.

On many different occasions—most recently in 2011—this Court has been quite clear that easement matters and water rights matters are separate: "In Idaho, ditch rights and water rights are separate and independent from one another." *Zingiber Inv., LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 249 P.3d 868 (2011); See also *Beach Lateral Water Users Ass'n v. Harrison*, 142

Idaho 600, 130 P.3d 1138 (2006) ("Although a ditch easement typically concerns the conveyance of water, it is 'a property right apart from and independent of questions of water rights.') (quoting *Savage Lateral Ditch Water Users' Ass'n. v. Pulley*, 125 Idaho 237, 242, 869 P.2d 554, 559 (1993)). Thus, the "right for the conveyance of water is recognized as a property right apart from and independent of the right to the use of the water conveyed therein" and "[e]ach may be owned, held and conveyed independently of the other." *Simonson v. Moon*, 72 Idaho 39, 47, 237 P.2d 93, 98 (1951). If water rights and ditch rights are as intertwined as Appellant argues, the conveyance system would be an element of a water right. This is clearly not the case. See Idaho Code § 42-1411 (outlining the elements of a water right to be decreed in an adjudication). Otherwise, IDWR would have the authority to grant easements if, for descriptive purposes, a delivery system is referenced in the water right permit or transfer processes.

IDWR does not have the authority to grant easements through water right approvals. R. Vol. 3, p. 579 (*Affidavit of Ernest Carlsen* stating IDWR does not have the ability to grant easements.); See also R. Vol. 2, p. 431 (condition No. 10 of Telford water bank approval: "([t]his rental does not grant any right-of-way or easement to use the diversion works or conveyance works of another party."). The position of IDWR is unsurprisingly consistent with the Idaho Supreme Court precedent cited above. State authorization to use the State's water does not allow the authorized water user to use the water with an automatic easement to convey such water across the lands of someone else. Any easement issues must be dealt with separately.

Taken to its logical extreme, under Appellants' argument, this means Respondents would not even need a transport agreement from BLRID to use the Moore Canal if they wanted to

because of a descriptive reference in the water rights stating where the water is delivered. Surely BLRID would not agree with this legal position. See, e.g., R. Vol. 8, p. 1352 (paragraph 8 of transport agreement stating that no ditch or easement rights accrue by virtue of the agreement). The district court correctly determined "identification of a delivery system in a permit, license, transfer application, or similar document is for descriptive purposes only and has no binding effect for purposes of the pending motions." R. Vol. 4, p. 680. This finding is consistent with Supreme Court precedent. IDWR cannot grant easements.

Defendants also argue that if the Respondents want to change their delivery system out of the Moore Canal, they need to file a transfer with IDWR. *Appellants' Brief* at 18. But even if we presume that a descriptive reference to a delivery system is an element of the water right, and does require a transfer under Idaho Code § 42-222, it would not change the outcome of the eminent domain matter. Upon reconsideration, Judge Watkins held:

> Whether Respondents' water rights require, as a condition of use, that Respondents transport their water via the Moore Canal is a question *unrelated* to the issue before the Court. . . . Accordingly, Cains may or may not be correct when they assert Respondents must petition IDWR if they seek to change or eliminate conditions regarding the delivery of their water. However, the conditions of approval listed on [Respondents'] water rights have no bearing on Respondents' ability to condemn an easement for the irrigation and reclamation of their arid lands. As Cains correctly point out, "[t]he relevant issue is one of necessity."

R. Vol. 9, 1531 (emphasis added).

Therefore, the descriptive reference to the Moore Canal in some of Respondents' water rights does not make the Moore Canal an element of those water rights, and therefore this does not defeat Respondents' claim of necessity for the pipeline. Use of the pipeline by Respondents to

convey their irrigation water does not violate any part of Respondents' water rights or defeat the issue of necessity. Easement matters must be addressed independent of water rights issues.

E. The District Court did not err by granting Respondents' *Motion for Partial Summary Judgment* regarding the eminent domain cause of action. Both district judges involved in this case correctly determined that Respondents satisfied the necessary elements under Idaho law in order to exercise eminent domain.

1. Legal authority and requirements for exercise of eminent domain for a buried irrigation pipeline.

In *White v. Marty*, 97 Idaho 85, 540 P.2d 270 (1975), the Idaho Supreme Court stated the following regarding the condemnation of irrigation easements:

> Chapter 11 of Title 42, Idaho Code, deals with ditch rights of way for the irrigation of land. I.C. § 42-1102 gives to *landowners* a right to an easement or right of way across the land of others to supply irrigation water. If the landowner of an adjacent parcel refuses to allow such access for irrigation water, the owner of land may condemn a right-of-way under the law of eminent domain. I.C. § 42-1106.

Id. at 272-73 (emphasis added). Idaho Code § 42-1106 provides as follows:

> In case of the refusal of the *owners or claimants of any lands*, through which any ditch, canal or conduit is proposed to be made or constructed, to allow passage thereof, the *person or persons desiring the right of way* may proceed as in the law of eminent domain.

Id. (emphasis added).

Title 42 of the Idaho Code does not provide an independent process for irrigators who seek to exercise eminent domain. Rather, such landowners, who may or may not own water rights, "must proceed under Idaho's law of eminent domain, found in I.C. §§ 7-701 *et seq.*" *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 607, 619 P.2d 122, 125 (1980); See also R. Vol. 9, p. 1528-29.

Idaho's eminent domain statutes are found at Idaho Code §§ 7-701 to 7-721. Idaho Code § 7-704(1)-(2) sets forth the prerequisites that must be met in order for property to be taken pursuant to eminent domain (subparts 3 and 4 are not applicable). They are that the use must be authorized by law, and the taking is necessary for that use. Additionally, while not stated in Idaho Code § 7-703, Idaho Code § 7-707(7) requires that a complaint for eminent domain must contain a certification that good faith negotiations were undertaken by the condemnor prior to its filing.

Therefore, for purposes of summary judgment, Respondents must demonstrate their sought after pipeline easement to convey irrigation water is (1) a use that is authorized by law, (2) that the taking is necessary to such use; and (3) that Respondents negotiated in good faith to purchase the irrigation pipeline easement prior to filing suit for condemnation. As determined by the district court—first by Judge Tingey and then by Judge Watkins—Respondents are entitled to summary judgment on each of these issues.

2. The use for which Appellants seek to use condemnation is an irrigation pipeline easement, which is a use authorized by law, even by private individuals or entities.

Respondents' burden on summary judgment is to demonstrate that they meet the "use" requirement of Idaho's eminent domain statutes. This requires Respondents to demonstrate (1) a right-of-way or easement for the irrigation pipeline is subject to condemnation, (2) the purpose of the easement or right of way–conveyance of agricultural irrigation water through a buried pipeline–is an authorized use under Idaho law, and (3) the exercise of eminent domain may be exercised by private individuals under Idaho law for the specific purpose of conveying irrigation water to arid lands. As set forth below, Respondents meet each of these requirements.

a. An easement or right of way is subject to a taking.

Idaho Code § 7-703 sets forth the types of property that may be taken under Idaho's eminent domain statutes. The property interest sought by Respondents in this case is a right of way or easement for an irrigation pipeline, which will occupy real property owned by Appellants. Idaho Code § 7-703(1) provides that one class of property subject to a taking is "all real property belonging to any person." The Idaho Supreme Court has also held that "[i]n order to assist owners of water rights whose lands are remote from the water source, the state has partially delegated its powers of eminent domain to private individuals. I.C. §§ 42-1102 and 1106. These statutes permit landlocked individuals to *condemn a right of way* through the lands of others for purposes of irrigation." *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 607, 619 P.2d 122, 125 (1980) (emphasis added) (internal citations omitted). Because Respondents seek to condemn a right of way, which is permitted in Idaho as a matter of law, Respondents meet this requirement and can therefore exercise the power of eminent domain.

b. The purpose of the right of way–conveyance of agricultural irrigation water–is an authorized use under Idaho Code § 7-701, and eminent domain can be exercised for this purpose even by private persons/entities.

Idaho Code § 7-701 sets forth the uses for which eminent domain is authorized, and it specifically authorizes condemnation of private land for "pipes." Idaho Code § 7-701(3). Because Respondents are seeking to obtain a right of way for a pipeline, the use for which they seek to exercise under Idaho law is expressly authorized by statute.

Regarding the specific use of "irrigation" the pipeline will serve, the Idaho Supreme Court has recognized that "[t]he *irrigation* and reclamation of arid lands is a well recognized public use, . . . even if the irrigation project is ostensibly intended to benefit only *private* individuals. *Canyon View Irrigation Co.*, 101 Idaho at 607, 619 P.2d at 125 (internal citations omitted) (emphasis added). Additionally, this Court has stated that the authority of irrigators to proceed under condemnation "govern[s] the exercise of what is commonly called a *private eminent domain power*." *Erickson v. Amoth*, 112 Idaho 1122, 1124, 739 P.2d 421, 423 (Ct. App. 1987) (emphasis added). Therefore, the right to condemn a right of way for an irrigation pipeline is an authorized use under Idaho law, even if it is for private individuals. Respondents therefore meet this eminent domain requirement.

c. Respondents lands are "arid" lands, and therefore qualify as lands that can be serviced by a pipeline placed by eminent domain.

In the *Canyon View Irrigation Co.* case discussed above, the court stated the "irrigation and reclamation of *arid* lands is a well recognized public use, . . ." *Canyon View Irrigation Co.*, 101 Idaho at 607, 619 P.2d at 125. Keying in on the use of the term "arid," the Appellants contend that Respondents "lands are not 'arid' lands; their land had been developed and irrigated for thirty or more years." *Appellants' Brief* at 29. Stated another way, Appellants argue the climate classification of arid land changes to non-arid lands once irrigation occurs.

This argument was similarly raised before the district court, who analyzed it as follows:

> [T]he Idaho Court of Appeals stated in *Merrill v. Penrod*, 109 Idaho 46, 704 P.2d 950 (Ct. App. 1985) that dry and arid climates are those "where irrigation is necessary in order to cultivate the soil." Thus, where a parcel of land has been

> irrigated in the past is irrelevant in determining whether the land is arid. The important question, rather, is whether irrigation is required to cultivate the soil now and in the future.
>
> In this case, there is no dispute [Respondents] need irrigation water to cultivate their land. This Court concludes [Respondents]' land is arid, and irrigation of that land is a public use for which the law of eminent domain may be evoked.

R. Vol. 9, p. 1530-31.

The district court's analysis was correct. The mere existence of the need for water to cultivate crops on Respondents' lands demonstrates their lands are arid. Arid lands are those that, without irrigation, would not be able to produce a crop. Land does not lose its arid nature because it is irrigated. The need for irrigation demonstrates it is arid. Scott Slocum of PU Ranch testified that his land would not produce crops without artificial irrigation, and is therefore arid under Idaho law. R. Vol. 4, p. 774 (Deposition of Scott Slocum, at p. 14, LL.8-17). The Supreme Court should uphold the district court's decision in this regard.

3. Respondents' taking of a right of way on Appellants' property is reasonably necessary for Respondents' use, as there are no other reasonable alternatives for Respondents to convey their ground water.

a. Reasonable necessity standard.

The Idaho Court of Appeals case of *Erickson v. Amoth*, 112 Idaho 1122, 739 P.2d 421 (Ct. App. 1987) provides that the necessity required for eminent domain is one of "reasonable necessity." This standard has "no formulaic meaning," but one seeking to exercise eminent domain need not show that a "legally available route is *absolutely* necessary." *Erickson*, 112 Idaho at 1124, 739 P.2d at 423 (emphasis added). Therefore, "necessity" in the context of eminent domain means "reasonable necessity," not absolute necessity.

As set forth below, while necessity is generally a question of fact, there is no dispute of fact in these circumstances that Respondents had neither legally available nor reasonable alternatives available to them to convey their irrigation water. Respondents had no legal authorization for use of the Moore Canal in 2010. In addition, reasonable necessity exists because of (1) the permissive and adhesion-like nature of the transport agreements and the BLRID's past instance of unilaterally terminating them, (2) the fact that Sorensen was risking forfeiture with one of his water rights and BLRID would not provide him a transport agreement, (3) the shortcomings in the methodology of the BLRID accounting system in the Moore Canal and elsewhere in the district, (4) the conveyance loss savings associated with the pipeline and lined ditch project, and (5) the minimal impact of the pipeline on Appellants' property.

b. Because the transport agreements were to sunset as called for in the BLRID settlement agreement for the ground water rights of Telford and PU Ranch, and because of Sorensen's lack of a transport agreement, the Moore Canal was not an option for Respondents to transport their water in 2010, the year the eminent domain action commenced.

The settlement agreement entered into between Respondents and BLRID speaks for itself. The parties jointly agreed that Respondents' existing transport agreements should sunset at the end of 2009. Therefore, at the time the eminent domain lawsuit was filed in 2010, Respondents had no permission to use the Moore Canal because they had no transport agreements in place. There was therefore no "legally available" route to use. Appellants claim that the termination was done by Respondents in a premeditated fashion in order to create their own necessity for condemnation, but this makes little sense. At the time the settlement agreement was entered into, no objection to

the pipeline had been raised by Appellants, and therefore, eminent domain was not even contemplated. Without permission to use the Moore Canal in 2010 when the eminent domain lawsuit was filed, it was not a viable option. No other options for conveying water, other than the pipeline, were available. Based on this fact alone, Respondents have reasonable necessity to condemn the pipeline right of way, and summary judgment on this issue is appropriate.

c. Because of the permissive and adhesion-like nature of the transport agreements, the BLRID's recent instance of unilaterally terminating them, and the precipitous nature of the BLRID's transport agreements in place at the time the eminent domain action was commenced, there was reasonable necessity for the pipeline.

Despite the plain language of the settlement agreement, Appellants insist that BLRID would now execute new transport agreements. Whether they would now is irrelevant to the situation existing in 2010 when there were no transport agreements in place. Furthermore, the transport agreements are permissive licenses, and are revocable. See *Rowan v. Riley*, 139 Idaho 49, 72 P.3d 889 (2003). Despite this insistence that the BLRID would enter into new ones, no evidence has been provided that the BLRID board would approve new transport agreements, even in 2012 or 2013. Appellants insist that Manager Rindfleisch is the decision-maker on these transport agreements, but he has clearly stated he does not make those decisions. R. Vol. 5, p. 877-81 (quotation of Rindfleisch deposition testimony in briefing to the district court).

Furthermore, the question is not whether the Moore Canal is available as an option, but whether the transport agreement option is even reasonable. It is not. New transport agreements remain permissive and adhesion-like in nature. These transport agreements are non-negotiable,

are set for a term of years, and are revocable. Expiration of these transport agreements allows BLRID to impose new conditions on landowners based on matters they determine need to be changed. The agreements are also not assignable, and require execution of the newest transport agreement incarnation if a new person purchases the property subject to the transport agreement. See, e.g., R. Vol. 8, p. 1323-1450 (various iterations of transport agreements). Respondents cannot invest millions of dollars in farm planting, cultivation, equipment, etc., and remain subject to the whims and emotions of the BLRID who can revoke the permission at any time and amend provisions of the transport agreements where Respondents have no say in their drafting.

As an example of this, Respondent Sorensen was the subject of a separate litigation proceeding with the BLRID at the same time the matter now on appeal was in its early stages. BLRID unilaterally terminated two transport agreements held by two other landowners, Leon Folkman and Isom Acres Ltd. Partnership, whose land was leased at the time by Sorensen (Butte County Case No. CV-2009-94).

The dispute began when Sorensen complained that water diversions were not being accounted for in the Eastside-Island-Munsey Canal portion of their system (the "EIM" system). The transport agreement in place at the time said that the seepage, or "shrink", was supposed to be for "losses for seepage and evaporation" and that all users on the ditch were supposed to have measuring devices in order to properly calculate diversions. In response to those complaints, BLRID alleged Folkman and Isom themselves did not have appropriate measuring devices and controlling works, and terminated their agreements. This was done despite the fact that the Folkman and Isom diversions were substantially reworked in 2008 and 2009 to allow for use of the

most sophisticated type of measuring device, a polysonic flow meter, and could be controlled. R. Vol. 3, p. 478 (photograph of diversion system with polysonic meter attached).

During the litigation, Manager Rindfleisch admitted he did not recognize many diversions on the EIM system, and admitted that a number of the diversions did not have measuring devices.[4] R. Vol. 3, p. 474-75 (Rindfleisch Deposition at p. 95, L. 3 through p. 103, L. 20). Yet other water users who did not have a measuring device did not have their transport agreements terminated. The disparate treatment of Folkman and Isom is even more problematic because the BLRID ditch rider assigned to the EIM canal, Kiley Smith, did not believe the measuring devices and diversion system were problematic, but he was not consulted before the transport agreements were terminated. R. Vol. 3, p. 492 (Kiley Smith Deposition at p. 84, L. 9 through p. 85, L. 12). Despite this evidence, the transport agreements were still terminated.

In response to that litigation, BLRID amended its form transport agreement to its benefit. As to conveyance loss calculations, the provisions were amended to provide:

> The parties covenant and agree that the loss of water supplies conveyed pursuant to this agreement will be determined by the District by using reasonable calculations of evaporation, operational losses and conveyance losses as they are similarly applied to other water supplies co-mingle in the same common canal(s) . . . District's methodology of calculating losses, now existing or as hereafter modified, shall be used to calculate the distribution of water.

R. Vol. 3, p. 484 (¶5 of transport agreement). This change now expressly gave the BLRID the ability to charge unaccounted for water as conveyance losses to the ground water user (this methodology is discussed below).

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[4] As explained in further detail below, the unaccounted-for diversions resulted in much higher conveyance loss allocations to Respondents because the water pumped into the EIM system by Folkman and Isom was being taken by others, but was accounted as conveyance loss.

Additionally, Paragraph 11.2 of the proposed transport agreement provides that breaches of the agreement are determined by BLRID alone, and if a breach is determined, only a ten (10) day notice of the termination is provided, placing farmers in a difficult position. It grants no property rights to the landowner, and even expressly states so at Paragraph 9 (which is also included in prior versions of the transport agreements).

Finally, paragraph 16 of the transport agreement provides that "[i]n the event District is required to obtain legal counsel to enforce this agreement or file or defend a suit alleging a breach of this agreement or seeking to terminate this agreement, Landowner agrees to pay the attorney's fees and costs incurred by the District." R. Vol. 3, p. 787. Thus, if the ground water user sues BLRID, and is even found to be right, he must still pay BLRID's attorneys fees. In response to Appellants' defense of these provisions on summary judgment, the district court stated: "Well, I don't know how you can say that. Certainly an attorney fee provision to a prevailing party is very common, but if there's no prevailing party analysis, to me that's a horse of a different color." Tr. *Motion for Summary Judgment*, p. 127, LL. 4-8; See also *Id.*, p. 102, LL. 4-12. Ultimately, the district court was troubled with the permissive nature and onerous provisions of the transport agreements, and held that certain conditions in the transport agreements were "undesirable if not unconscionable." R. Vol. 4, p. 681. The district court summarized it best when it stated "[a]nyone intending to expend significant resources in reclaiming arid lands would certainly have to question the wisdom of doing so if the only way to irrigate the land was through the District's Moore Canal." R. Vol. 4, p. 681. The district court concluded, "while use of the Canal may have

been considered viable historically, the Court finds from the evidence that there is reasonable necessity for use of the pipeline." R. Vol. 4, p. 682.

Defendants argue that Respondents have other transport agreements with the BLRID, and therefore, because of the existence of these other transport agreements, there is no necessity for the pipeline. This does not negate the fact that as to the specific water rights previously permitted to be delivered through the Moore Canal, no transport agreements existed. Further, as to these other transport agreements, the factual circumstances surrounding their use differ. For example, one of the ground water transport agreements that Telford entered into in 2010 was because he had no other choice due to litigation between him and a joint well owner named Harold Babcock. This matter was settled in February of 2010 (Case No. CV-2010-21), and water will now be diverted into the same UC Canal system the pipeline at issue in this matter diverts into. Telford will therefore avoid the similar problems experienced with the shrink calculation and actual losses in the Moore Canal evident in this matter.

The other transport agreements for PU Ranch and Mitchell Sorensen referenced in Appellants' briefing notably are for Big Lost River surface water, not ground water. The diversion point is many miles away from the Respondents' places of use, more than it is for their ground water diversions. At this point, it is not economical for Respondents to pipe their surface water the length of the entire canal, and therefore, they simply have no other alternative at this time but to accept the permissive nature of the BLRID transport agreements to deliver that water. However, acceptance of an inferior delivery system for the time being does not mean Respondents would be prohibited from condemning an easement in the future for these rights as well.

Furthermore, we note that these surface transport agreements introduced by Appellants prior to their motion for reconsideration do not contain the attorney's fees provision to pay any and all attorney's fees if there is a dispute, even if the landowner is correct. Nor do these agreements contain the recent amendments that change the calculation of conveyance loss. These provisions were particularly objectionable to the district court. The transport agreement process will require Respondents to sign the latest version of these transport agreements, which could contain the above provisions. This allows for the potential further imposition of more unreasonable provisions, and therefore, this is not a reasonable option for Respondents.

In short, the existing surface water transport agreements and the Telford ground water transport agreement (involving the Babcock matter) do not defeat a finding of reasonable necessity. As described below, even if a transport agreement is an option in the future, and BLRID acts contrary to the settlement agreement they signed, the pipeline provides the Respondents with the ability to better measure, utilize, and make beneficial use of their water and irrigate their arid lands for the production of crops, which further supports a finding of necessity.

d. BLRID would not enter into a transport agreement with Sorensen, who was risking forfeiture with one of his water rights, and therefore, reasonable necessity existed for the pipeline.

Respondents determined that a cooperative project between them would allow Sorensen to divert water from his well pursuant to his water right, which Sorensen had not done for nearly five years given BLRID's position that it would not enter into a transport agreement with Sorensen. Sorensen's water right was close to being unused for five years, risking forfeiture of the water

right. *See* Idaho Code § 42-222(2). The last time the water right was used was in the fall of 2004.

At the time the project concept was thought of, Sorensen did not have a transport agreement, and BLRID would not permit him to use the Moore Canal. R. Vol. 1, p. 117-19 (Mitchell Sorensen Deposition at p.46, L. 5 through p. 49, L.14; p. 69, L. 1 through p. 71, L. 14). Thus, even with prior use of the so-called Old Moss Well, BLRID would not permit its further diversion into the Moore Canal based on the position that the well had been abandoned, despite a recent decree in the Snake River Basin Adjudication for the parent right of Mr. Sorensen's Water Right No. 34-13841 (which received a partial decree in the SRBA on June 22, 2004) that authorized use of the Old Moss well for diversion of this water right. Sorensen therefore had no ability to convey this water right given BLRID's position on the matter, and the pipeline was his only option. He certainly had reasonable necessity for the pipeline.

e. Reasonable necessity is also evident because of the shortcomings in the methodology of the BLRID accounting system in the Moore Canal and in other parts of the district, which over-estimates conveyances losses and negatively impacts Respondents, who are at the tail end of the Moore Canal.

As set forth in the factual background above, the Respondents moved forward and installed the pipeline in order to avoid commingling of water in the Moore Canal, which often resulted in Respondents being charged significant, highly variable, and unexplainable conveyance losses on their ground water by BLRID. In deposition testimony, Manager Rindfleisch described what shrink is, and it is more than conveyance losses and evaporation. It includes unaccounted for water, which could be water that is stolen or improperly measured. R. Vol. 3, p. 472-73

(Rindfleisch Deposition at p. 74, L. 24 through p. 79, L. 17). The spreadsheet example prepared by Respondents' counsel referred to in Mr. Rindfleisch's testimony is found at R. Vol. 3, p. 480, and it illustrates that accurate accounting and measurement is essential in order to convey Respondents' ground water. Otherwise, Respondents' pumped ground water is taken, accounted as conveyance loss, which results is less water available at their farms and less crop production.

Even during the deposition of Manager Rindfleisch taken at the end of 2010, once the summary judgment had been entered, he admitted to just finding out about a diversion on the Moore Canal that did not have a measuring device. R. Vol. 4, p. 802 (Rindfleisch Deposition p. 46, L. 13 through p. 47, L. 6). For years, this diversion has no doubt, at times, been taking ground water pumped at Respondents' sole expense, which was then accounted to Respondents as conveyance losses. Allowing the Respondents to have their own private system—and avoiding the commingled supplies in the Moore Canal—has allowed Respondents to better measure, utilize, and make beneficial use of their water. The district court specifically held "the evidence establishes that use of the Canal has been very inefficient in delivering water to Respondents such that they have been unable to irrigate the full amount of acreage authorized by the water rights . . ." and that "through the pipeline more water will actually reach Respondents' property from the wells thereby allowing Respondents to reclaim and/or irrigate more acres." R. Vol. 4, p. 681-82. The court was likewise troubled because of "the evidence that Plaintiffs would bear the brunt of stolen water as well as unmeasured or improperly measured water diversions." R. Vol. 4, p. 681. There is no evidence or argument advanced by Appellants that should change these conclusions.

f. The conveyance loss savings associated with the pipeline project are reasonable and necessary under Idaho law, and consistent with declared legislative policy.

This Court has stated that "[p]lacement of irrigation ditches and underground pipes or addition of gates, collars and safety screens, is *common and necessary* in modern irrigation practices . . . ." *Abbott v. Nampa School District No.*, 131, 119 Idaho 544, 551, 808 P.2d 1289, 1296 (1991) (emphasis added). This quote is from a 1991 case, decided over two decades ago, where this Court wisely recognized the need of a modern society to be more efficient in conveying water.

Similarly, the Idaho Legislature has recognized the necessity for water conservation in Idaho. See Idaho Code § 42-250 ("The legislature finds that voluntary water conservation practices and projects can advance the policy of the state of Idaho to promote and encourage the conservation, development, augmentation and utilization of the water resources of this state. The legislature deems it appropriate, therefore, to encourage and support voluntary water conservation practices and projects." This includes "reductions in conveyance losses.").

Respondents' pipeline and delivery system conserves water in both the pipe and the partially-lined ditch in the UC Canal. Respondents intend to line more of the ditch as finances permit. It could be argued that the conveyance loss savings alone demonstrate reasonable necessity in these situations, but based on the other reasons explained above, the court does not need to decide whether conveyance loss savings alone are sufficient to establish necessity.

g. The benefits derived from the pipeline to Respondents are not outweighed by possible damage or inconvenience to the Appellants.

In *Erickson v. Amoth*, this Court held that when considering reasonable necessity, "the benefits derived from the easement must not be outweighed by possible damage or inconvenience to the owners of the servient property." *Erickson v. Amoth*, 112 Idaho 1122, 423, 739 P.2d 421, 1124 (Ct. App. 1987). In placing the pipeline, Respondents did so in as responsible manner as possible in a place that made logical sense, and buried the pipeline to minimize the impacts to Appellants' property. Respondents explored alternative routes for placement of the pipeline. Unfortunately, Appellants own nearly two miles of the old railroad right of way both north and south of the location of the pipeline. Respondents have to cross property at some point, and chose to locate the pipeline in its current location because it provided the most direct route for connecting the three wells to the pipeline. Additionally, because the pipeline is buried, Appellants are free to graze over top of it, dry farm it, or make other use of it because the pipeline does not occupy the property's surface.

As part of the reasonable necessity analysis, the district court appropriately followed *Erickson v. Amoth*, and considered whether benefits derived from the right of way were outweighed by the damage to the property: "The subject pipeline crosses Defendants property near where the Moore Canal crosses. There is no evidence that the pipeline would have any material effect on Defendants' use or intended use of the property. Additionally, *the evidence establishes that the location of the pipeline is the most logical and reasonable under the circumstances.*" R. Vol. 4, p. 682 (emphasis added). The Appellants have not provided evidence that would refute the district court's findings on this issue, and therefore, the district court's decision should be upheld.

h. Conclusion.

Given the lack of transport agreements for Respondents in 2010, the permissive and adhesion-like nature of the transport agreements, BLRID's past instance of unilaterally and unreasonably terminating transport agreements, the risk of forfeiture to Sorensen's water right, the deficiencies in the methodology of the BLRID accounting system, the conveyance loss savings associated with the pipeline project, and the minimal impact to Appellants' property, reasonable necessity exists. Because eminent domain can and must be exercised, it was not an error for the district court to deny summary judgment on the trespass issue. See *Appellants' Brief* at 30. The district court's decision on these issues should be upheld in all respects.

F. Respondents offered to purchase the right of way from Appellants at values well above fair market value, which offers have been rejected. There is no dispute of fact Respondents have negotiated in good faith, and the district court's decision in this regard should be upheld.

As explained above, *prior* to the filing of a complaint for eminent domain, the Respondents must certify that they have negotiated in good faith to purchase the property to be taken. Regarding this certification, the Idaho Supreme Court has stated that this requirement is not to be "lightly regarded." *Idaho Power Co. v. Lettunich*, 100 Idaho 582, 582-83, 602 P.2d 540, 540-41 (1979) (quoting *State v. Bair*, 83 Idaho 475, 480, 365 P.2d 216, 219 (1961))(citations omitted). However, this Court has also held that to require a condemning entity to continue negotiations "after the owners themselves close the negotiations by refusal to discuss matters or consider bona fide offers would be unrealistic." *Southside Water and Sewer Dist. v. Murphy*, 97 Idaho 881, 883, 555 P.2d 1148, 1150 (1976).

Appellants purchased the property through which the Pipeline traversed in 1996 for $1,500 per acre. R. Vol. 1, p. 227. Despite this amount, the Appellants' initial offer of $150,000 for a buried pipeline easement, which would occupy .047 acres underground, was *one hundred times* the amount they paid for an *entire acre*. Just before the lawsuit was filed, Respondents offered five thousand dollars ($5,000.00), an amount that is one thousand percent the value that Appellants ultimately stipulated to as being the value of the easement. The offers for purchase of the easement both before and after the litigation was commenced (in May of 2010) are contained at R. Vol. 1, pp. 235-244, 181-198, and summarized in table form at R. Vol. 1, p. 69.

Regarding the $150,000 offer, Appellants argue "Mr. Cain reaffirmed his position in that regard when asked why he offered to sell the [Respondents] an easement for the 'ridiculous' price of $150,000. When asked if that offer was "a little ridiculous," Cain responded: It was no more ridiculous than taking my land, but I really didn't want to sell it." *Appellants' Brief* at 43-44. This statement from Appellants does not accurately reflect the record because the question was not asked by counsel as represented. The "ridiculous" term was not suggested by Respondents' counsel, but was the very word used by Mr. Cain to describe the offer when asked if the $150,000 offer was based on an appraised value. Here is the exchange:

> Q: (BY MR. HARRIS): The letter that we marked as No. 16, is that the letter that asks for $150,000 for the easement?
> A. Uh-huh. Yes. Sorry.
> Q. Okay. And was that based on an appraised value?
> A. No.
> Q. Okay. What was it based upon?
> A. Technically, I didn't want the pipe in; so I gave you a ridiculous price.
> Q. Okay. So you admit that that was a little ridiculous?
> A. It was no more ridiculous than taking my land, but I really didn't want to sell it.

R. Vol. 3, p. 521 (Don Cain Deposition, p. 197, LL. 5-18). This statement was noted by the district court in its analysis of the good faith element. R. Vol. 4, p. 683.

Appellants argue that the good faith negotiations were untimely because they were not undertaken prior to the pipeline being installed. Easement purchase negotiations were not undertaken because, of course, Respondents believed they had authorization for the pipeline to be installed. Once an objection was received, however, Respondents immediately began the good faith negotiation process well before their *Complaint* was filed. The same argument of untimeliness was made before the district court, and the district court determined on summary judgment that Respondents met the requirement to engage in good faith negotiations because the offers occurred before the eminent domain complaint was filed. R. Vol. 4, p. 682-83 ("A plain reading of § 7-707 indicates that the requirement of good faith effort to resolve the dispute must only be made prior to the filing of the lawsuit.")

At the time the district court entered summary judgment, the remaining issue was the determination of damages, and payment of just compensation. The trial on the damages issue was vacated to allow Appellants more time for discovery, and the Respondents' appraisal report was introduced in response to Appellants' motion for reconsideration because Appellants stipulated to the determination of just compensation for the easement submitted by Respondents in the amount of $500.00 ($27.55 actual damages) based upon their appraiser's report: "Given that posture, Cains will stipulate to the alleged amount of damages asserted in the appraisal report for purposes of avoiding the time and expense of additional evidentiary hearings." R. Vol. 4, p. 759; See also

R. Vol. 5, p. 939. (expert concludes that easement has an actual value of $27.55, but that "no one would pay only $27.55 to purchase a permanent easement. . . we conclude that the subject has a token value of $500. This amount would represent the time and effort required for the property owner to sign an easement.") The fact that the Appellants would stipulate to this amount, which was much less than offers made previously, further demonstrates that Respondents engaged in good faith negotiations. Appellants referred to the amounts offered by Respondents as a "pittance," *Appellants' Brief* at 31, but the evidence provided through the appraisal belies this claim, particularly when this court considers that the just compensation amount was stipulated to by Appellants. Given the undisputed facts of the negotiations engaged in by Respondents with Appellants, Respondents engaged in good faith negotiations.

G. The district court did not err in finding that Telford Lands LLC has standing in this matter.

On the issue of the standing of Telford Lands LLC, the arguments in *Appellants' Brief* on this issue are the same as those raised previously. The district court determined that Telford did have standing on account of his authorized water supply bank lease approved by IDWR "whereby Telford may draw water from a well east of Defendants property, which water would then be conveyed through the pipeline and desired easement. . . . where Telford would clearly derive a benefit from conveying water from the P.U. Ranch Well, such confers standing on Telford." R. Vol. 4, p. 678. A water supply bank lease is authorized pursuant to the provisions of IDAPA 37.02.03.

Appellants argue they are "unaware of any legal precedent that would authorize a tenant with a lease for a term of years to institute eminent domain proceedings in order to obtain a permanent easement on another's property." *Appellants' Brief* at 39. This claim asks the wrong question. The correct question is whether Mr. Telford is a landowner with the need to convey irrigation water under Idaho Code §§ 42-1102 and 1106. The district court held the plain language of these statutes "gives *landowners* the right to proceed under the law of eminent domain if certain conditions exist." R. Vol. 9, p. 1529 (italics in original). Because Telford is a landowner with a need for irrigation water, and possessed a water bank lease for use of Sorensen's well, he has standing to be a part of this eminent domain proceeding.

H. Appellants cannot assert on appeal that Respondent's *Complaint* was deficient because it did not have a surveyed legal description when Appellants were given an opportunity to address Respondents' proposed surveyed legal description, and chose not to challenge the surveyed description.

Appellants allege that Respondents' *Complaint* for eminent domain was deficient because it did not contain a surveyed legal description. *Appellants' Brief* at 34. The *Complaint* contained a written description and detailed GIS map of where the proposed easement was located, and the map even showed the easement over an aerial photo with Appellants' home in the photo. R. Vol. 8, p. 1288. Idaho Code § 7-707(4) only requires a description and depiction of "the location, general route and termini, and must be accompanied by maps thereof." In order to better describe the easement, as provided in Idaho Code § 7-705, Respondents' counsel made it clear at the motion for reconsideration hearing that if the court were to deny the motion for reconsideration, the Respondents would more precisely define the easement by survey as it was

generally depicted on the map and described in the appraisal report, which the Appellants stipulated to. Tr. *Motion for Reconsideration*, p. 21, LL. 6-19. The appraiser's valuation was based on a value of 2,000 square feet (a 20 ft. x 100 ft. easement), and the surveyed legal description was intended to more precisely define it. R. Vol. 5, p. 908.

Nevertheless, Appellants objected to the proposed judgment with the surveyed legal description. R. Vol. 6, p. 1022. The objection was granted, and the court requested the parties to submit evidence of the surveyed legal description by a certain date, and allowed a hearing if it was requested by one of the parties. R. Vol. 6, p.1027 (describing the court's order on this issue). Respondents submitted briefing and affidavits. R. Vol. 6, p. 1026. Appellants did not timely submit anything. One day later, Appellants submitted a *Notice of Objection to Respondents' Memorandum and Affidavits*, asking that the hearing not occur. R. Vol. 6, p. 1072.

Appellants had an opportunity to present argument on this issue, but elected not to. The district court ultimately issued its order on this issue, following the arguments provided by Respondents. R. Vol. 6, p. 1075; See also R. Vol. 6, p. 1026-71 (Respondents' briefing and evidence). The district court noted that no evidence or argument was presented by Appellants, and then summarized that the Appellants "simply object to the Court using a legal description of the property that was not included in [Respondents'] complaint." R. Vol. 6, 1075-76. The district court correctly cited to and discussed Idaho Code § 7-707(4), and found that Respondents' *Complaint* contained the necessary information. The district court also correctly determined that "[Appellants] never sought a more definite statement or claimed that they didn't know the location of the pipeline. . . [Appellants] have failed to challenge the legal description provided by

[Respondents] other than to argue untimeliness." R. Vol. 6, p. 1076. The district court thereafter executed the proposed judgment, and the hearing on the legal description was vacated. *Id.* (the *Final Order and Judgment* and *Order of Condemnation* is found at R. Vol. 6, p. 1078-84). The Appellants had their opportunity to participate in a hearing on this issue, and they voluntarily elected not to provide evidence or argument. They cannot now claim the district court erred because they elected not to participate. This Court should therefore uphold the district court's findings on this issue.

I. The district court did not err by denying Appellants their costs and attorney's fees.

The district court discussed *Ada County Highway District v. Acarrequi*, 105 Idaho 873, 878, 673 P.2d 1067, 1072 (1983) in its attorney's fees analysis, and coupled it with a prevailing party analysis. This is an appropriate analysis under Idaho law. See *State ex rel Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 828-29, 820 P.2d 695, 698-99 (1991) and *Lower Payette Ditch Company v. Harvey*, 152 Idaho 291, ___ 271 P.3d 689, 694 (2012).

The issue of whether there was a prevailing party was fully briefed before the district court. R. Vol. 6, pp. 1130-51, 1176-96. The matter was then decided by Judge Tingey after a review of the record and applicable case law, and his analysis demonstrates he carefully reviewed the issues. R. Vol. 7, p. 1251. In *Appellants' Brief*, there is no discussion of the abuse of discretion standard of review, and how Judge Tingey may have abused his discretion. See *Hopkins v. Troutner*, 134 Idaho 445, 447, 4 P.3d 557, 559 (2000).

There were four claims brought in the Respondents' *Complaint*, three of which were alternatives to keep the pipeline in place. The oral agreement theory was rejected on summary judgment, the eminent domain action was accepted, and the estoppel argument was disposed of—not on the merits, but because there was a remedy at law available to Respondents. R. Vol. 4, p. 685. Additionally, on the civil conspiracy claim, Respondents admittedly were not able to find any third party witnesses to the self-help actions that destroyed the pipeline and whether others participated. Consequently, no evidence could be presented on this issue, and Appellants prevailed. The district court did not abuse its discretion under a prevailing party analysis as both parties prevailed on the mixed claims.

J. Respondents should be awarded costs and attorney fees on appeal pursuant to Idaho Code § 12-121 and I.A.R. Rules 40 and 41. Additionally, Appellants should not be awarded costs and attorney fees on appeal.

In order for costs and fees on appeal to be awarded under Idaho Code § 12-121 and I.A.R. Rules 40 and 41, the "argument shall contain the contentions of the respondent with respect to the issues presented on appeal, the reasons therefore, with citations to the authorities, statutes and parts of the transcript and recorded relied upon." I.A.R. 35(b)(6); *Peterson v. Peterson*, 153 Idaho 318, ___, 281 P.3d 1096, 1103 (2012). "Normally, we will only award attorney fees on appeal under [Idaho Code § 12-121] 'when this court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation.'" *Lower Payette Ditch Company v. Harvey*, 152 Idaho 291, ___ 271 P.3d 689, 695 (2012) (quoting *Rueth v. State*, 103 Idaho 74, 81, 644 P.2d 1333, 1340 (1982). Conversely, "[a]ttorney fees will not be awarded under that statute 'where the losing party brought the appeal in good faith and where a genuine

issue of law was presented.' *Id.* Fees have been awarded when an appeal simply asks this court to second-guess the district court without presenting reasoned arguments. *Id.* at ___, 271 P.3d at 695; See also *Ketterling v. Burger King Corp.*, 152 Idaho 555, ___, 272 P.3d 527, 534 (2012).

In this case, we believe the appeal has been brought merely to invite this Court to second-guess the evidence. The matter was decided by two capable district judges, and the arguments from Appellants in both instances were found to be unpersuasive. On appeal, the same arguments have been replicated.

In addition, many of the arguments made by Appellants on appeal are unreasonable. As addressed above, Appellants, on appeal, (1) have argued from evidence stricken by the district court, (2) raised a due process issue for the first time, (3) maintained this case is a water rights case when this Court has made a clear distinction between water rights cases and easement cases, (4) maintained that IDWR can grant easements, (5) argued that the Moore Canal was a viable option for Respondents in 2010 even though the settlement agreement clearly provided no transport agreements were in place, (6) argued that the decision to have the 2009 transport agreements sunset was premeditated even though there was no objection to the pipeline from Appellants until a month and a half after the settlement agreement was executed, (7) maintained that Respondents' irrigated lands are "not arid" because they have been irrigated historically thereby changing their climatic classification, and (8) argued that the district court erred by including a surveyed legal description in a final order when Appellants elected not to submit arguments or evidence once the district court provided them the opportunity to do so.

Additionally, the Respondents were forced to file this lawsuit and assert eminent domain on account of Mr. Cain's self-help actions right at the time Respondents needed the pipeline most—just before the irrigation season. And this was done even after Cain filed a small claims action against the Respondents to potentially resolve the matter in an appropriate forum. Self-help is strongly discouraged in any property dispute, as described in *Weitz v. Green*, 148 Idaho 851, 864, 230 P.3d 743, 756 (2010) ("In short, parties who attempt to solve a property dispute through their own forceful action do so at their own peril."). The "peril" referred to in this case should be interpreted to include an award of fees and costs in the Court's discretion. Fees and costs on appeal should be awarded under Idaho Code § 12-121, I.A.R. 40, and I.A.R. 41.

IV. CONCLUSION.

For the reasons set forth above, the district court decisions—authored by two district judges—regarding the ability of Respondents to exercise eminent domain should be upheld. Respondents should be allowed to continue conveyance of their irrigation water through the superior system they have constructed and be allowed to continue with their enhanced ability to farm by receiving as much of their pumped ground water as possible. In the alternative, and in the unlikely event the district court's decisions are reversed, Respondents, at a minimum, are entitled to a trial on the merits to prove the elements discussed herein, particularly that of reasonable necessity.

In addition, Appellants should not be allowed to use substantive evidence on this appeal that was stricken by the district court. Further, the due process issue raised for the first time on this appeal should not be considered, and Appellants should not be permitted to challenge the

inclusion of the surveyed legal description of the easement because they failed to participate when provided the opportunity to do so by the district court. Fees and costs should not be awarded to the Appellants under either *Accarequi* or under a prevailing party analysis, and on appeal, Respondents should be awarded their attorney fees for defending against this appeal.

DATED this 27th day of September, 2012.

Robert L. Harris, Esq.
HOLDEN, KIDWELL, HAHN & CRAPO, PLLC

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the following described pleading or document on the attorneys listed below by hand delivering, by mailing or by facsimile, with the correct postage thereon, on this 27th day of September, 2012.

DOCUMENT SERVED: RESPONDENTS' BRIEF

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